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CHARITY AND INFORMATION: CORRECTING THE FAILURE OF A DISJUNCTIVE SOCIAL NORM

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Robert Cooter**

Charitable donations fund social goods that the state and markets undersupply. Despite widespread belief in the importance of private charity, most Americans donate little or nothing. Experiments in behavioral economics show that anonymity, not human nature, causes low contributions. Anonymity poses a particular challenge for charity because of the special character of the obligation. Charity is a disjunctive social norm, meaning the obligation is owed to "A or B or C or" Disclosure of each individual's aggregate conduct is necessary for the effectiveness of any disjunctive social norm. To revitalize charity we propose a public registry where each taxpayer can voluntarily disclose the ratio between his charitable giving and income. The registry will clarify the social norm and increase average donations. We extend our analysis to pro bono legal services where a similar registry would encourage attorneys to volunteer.

INTRODUCTION

Al and Tipper Gore gave \$353 to charity from an income of \$197,729 in 1997—0.2 percent of their annual income.¹ The mean donation in their income bracket is approximately 2.0 percent.²

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1. Gores' Charitable Giving Raises Some Eyebrows, CNN.COM, Apr. 15, 1998, <http://www.cnn.com/ALLPOLITICS/1998/04/15/gore.taxes/> (on file with the University of Michigan Journal of Law Reform). Annual tax returns are disclosed by the U.S. President and Vice President. See Tax Analysts, *Presidential Tax Returns*, <http://www.taxhistory.org/www/website.nsf/Web/PresidentialTaxReturns> (on file with the University of Michigan Journal of Law Reform).

2. See *infra* text and data accompanying notes 33–38 (showing that 2% is the mean contribution for households in the Gores' income bracket).

People criticized the Gores for not setting a better example. There is a general recognition that people, at least those whose income exceeds some threshold level, ought to donate.³ Despite this shared value, there is no consensus regarding the appropriate amount to give, and many people donate very little. In fact, almost a third of U.S. households, including many with high incomes, donate nothing.⁴

The problem is not innate stinginess, but rather lack of information. Behavioral studies show that people give generously when others observe their donations. In experiments, transparency yields high donations and anonymity yields low donations.⁵ Unfortunately, in the current environment charitable contributions are not transparent. Donations are often anonymously made from the privacy of one's home. Even when an individual takes credit for a particular contribution, observers still cannot know his total contributions to all charities. As will be explained, disclosure of aggregate contributions is necessary for an effective social norm of charity.

This information requirement follows from the special character of the charitable obligation. A person ought to give to some charities at least some of the time, but not to every charity at every opportunity. As described by philosopher Joel Feinberg, "duties of charity . . . require us to contribute to one or another of a large number of eligible recipients, no one of whom can claim our contribution from us as his due."⁶ The charitable obligation is *disjunctive* in the sense that it is owed to "A or B or C or . . .," but not necessarily to anyone in particular.⁷ Disjunctive obligations are problematic because they require extensive information to determine who has violated the norm. One cannot conclude that a person is uncharitable by observing that she failed to donate on a particular occasion. She may have given generously to other organizations on unobserved occasions. To determine that she

3. Most people (about 70%) make charitable contributions regardless of the fact that there is no formal sanction for failure to do so. See *infra* note 42 and accompanying text. In a survey, subjects who did not contribute were asked why they did not donate. The main responses were that they did not donate because of financial worries, a lack of time, or because the individual did not feel connected to his or her community. See INDEPENDENT SECTOR, GIVING AND VOLUNTEERING IN THE UNITED STATES, 1999 (1999) [hereinafter GIVING AND VOLUNTEERING STUDY]. None of these reasons imply that non-contributing individuals feel that donations are morally irrelevant. Rather, the reasons suggest that most individuals believe they should donate to charity, but due to a variety of factors often fail to do so.

4. See *infra* Figure 2.

5. See *infra* text accompanying notes 52–66.

6. Joel Feinberg, *The Nature and Value of Rights*, 4 J. VALUE INQUIRY 243, 244 (1970).

7. A disjunctive obligation is similar to Immanuel Kant's definition of an *imperfect* duty, of which he considers charity an example. See *infra* text accompanying note 25.

violated the norm, one would need to observe that she did not donate a sufficient amount to any organization.

Generosity depends on a person's total donations, not his specific donations to a particular charity. This makes it impossible to determine who is doing their fair share without additional disclosure. With the exception of some public officials like Al Gore, each person's total charitable donations are unknown to others. Because of this information gap, those making inadequate contributions are not observed and the norm of charity remains unenforced.⁸

To revitalize the charitable norm, we propose a public registry of donations on the internet. Each taxpayer who so wished could direct the tax authorities to disclose the ratio between his deductions for charitable giving and his income (e.g., 4%). Social pressure to participate would increase, particularly on public personalities—politicians, tycoons, actors, athletes—who are expected to set an example for others. The registry should have two effects. First, greater transparency should trigger criticism for penury and praise for generosity. Al Gore's subsequent behavior illustrates the potential benefits. After being criticized, the next year the Gores donated 6.8% of their income to charity—an increase of 3,400%.⁹ As more people disclose their charitable contributions over the registry, donations should significantly increase. Second, when people know how much others give, they will reflect on how much each member of society *ought* to give. Concrete discussions should clarify the vague norm of charity, rather like court cases clarify the common law's vague norm of reasonableness.

This Article consists of four parts. Part I develops a theory of the charitable sector. Private donations can finance social goods that the state and market undersupply. Yet private donations are limited by the disjunctive character of the social obligation. Part II presents theory and evidence about the effects of publicity on charity. Behavioral experiments show that subjects contribute more to a public good when other participants observe their contributions.¹⁰ Part III proposes to use the tax system to increase the flow of information about donations. A donation registry could dramatically increase charitable contributions and alleviate the under-funding

8. Recent behavioral studies suggest that social norms will erode over time unless supported by observation and the threat of sanction. *See infra* text accompanying notes 59–62.

9. Jennifer Moore & Grant Williams, *Adding Up the Gores' Giving*, CHRON. PHILANTHROPY, June 15, 2000, at 43.

10. *See infra* text accompanying notes 55–68.

of social goods.¹¹ Part IV applies the registry concept to pro bono legal services.

I. UNDERFUNDING

Education, poverty relief, scientific research, art, medical services, religion, and other social goods supplied by the nonprofit sector equal over 6% of U.S. national income.¹² Private donations, government grants, and user fees finance these activities.¹³ In 2000, nonprofits received approximately \$240 billion in private donations, and 15.5 billion hours of volunteer labor.¹⁴ Private donations are a critical but often undersupplied source of revenue for charitable organizations. We explore two problems—government failure and normative failure—that limit funding for many social goods.

A. Government Failure

An economist, Burton Weisbrod, suggests a theoretical reason why the state cannot supply an efficient mix of social goods.¹⁵ The democratic process generally leads the state to supply social goods desired by those in the middle of the political spectrum, but undersupply the social goods desired by those on the fringes. In

11. Ian Ayres and Barry Nalebuff have made a complementary proposal that also uses IRS information to increase charity. See Ian Ayres & Barry Nalebuff, Op-Ed., *Charity Begins at Schedule A*, N.Y. TIMES, Apr. 15, 2003, at A17 (on file with the University of Michigan Journal of Law Reform), available at <http://www.nytimes.com/2003/04/15/opinion/15AYRE.html>. Ayres and Nalebuff argue that the IRS should remind people of the charitable norm by disclosing average contributions for each income level. They also propose allowing taxpayers to deduct their current donations from the previous year's income up to the tax filing deadline of April 15. We commend the Ayres-Nalebuff proposal. Our proposal goes beyond Ayres and Nalebuff, however, by allowing aggregate disclosure at the individual level and thereby addressing the disjunctive nature of the charitable norm.

12. MURRAY S. WEITZMAN ET AL., THE NEW NONPROFIT ALMANAC AND DESK REFERENCE: THE ESSENTIAL FACTS AND FIGURES FOR MANAGERS, RESEARCHERS AND VOLUNTEERS 7 (2002) [hereinafter NONPROFIT ALMANAC].

13. See *id.* User fees are important for nonprofits that provide medical services and education. User fees, however, can seldom be extracted from poor people, and cannot be collected for many services such as improving air quality, preserving animal habitat, conducting scientific research, or promoting public health. Our focus is on social goods that cannot be adequately financed by user fees or service charges.

14. For donations, see AAFRC TRUST FOR PHILANTHROPY, GIVING USA 2003, at 200 (2003) (on file with the University of Michigan Journal of Law Reform) [hereinafter GIVING USA 2003]. For volunteering, see INDEPENDENT SECTOR, GIVING AND VOLUNTEERING IN THE UNITED STATES—KEY FINDINGS, 2001 (2001). Nonprofit organizations also received grants from governments that slightly exceeded the aggregate value of private donations of money, excluding the time donated by volunteers. See NONPROFIT ALMANAC, *supra* note 12, at xxxi.

15. See generally BURTON A. WEISBROD, THE NONPROFIT ECONOMY (1988).

theoretical models of majority rule, the median voter prevails. This is true even when the minority is willing to pay more than the goods cost.¹⁶ The heterogeneous preferences of voters cause the democratic state to undersupply some kinds of social goods. As the population becomes more diverse, the state will encounter greater difficulty in supplying the variety of social goods that people want. This will be true whether the state supplies social goods directly through its agencies, or indirectly by giving grants to nonprofit organizations. Weisbrod characterizes this problem as “government failure.”

In addition to limitations imposed by the median voter, other political phenomena limit the state’s willingness to supply certain social goods. Politicians avoid controversial causes and innovative ideas with significant risk of failure. In the United States, the separation of church and state precludes government grants to nonprofit organizations that promote religion or mix it with social services.

Charitable contributions to the nonprofit sector can solve the problem created by government failure.¹⁷ When some individuals want more of a particular social good than the political majority will supply, they can donate money and time to nonprofit organizations. By allowing tax deductions of charitable contributions, the state encourages nonprofits to supply social goods that it cannot or will not supply itself. In economic terms, charitable donations increase *allocative* efficiency.¹⁸

Correcting underfunding is not the only advantage the nonprofit sector holds over the state in supplying social goods. Even if government funded all social goods adequately, private donations still have advantages. Donors often take interest in the use of their funds and monitor performance of the recipient. To monitor performance, donors specialize in particular charities and stay informed. Donors increase contributions to nonprofits that perform well, and decrease contributions to nonprofits that perform

16. To be sure, there are various mechanisms that government can sometimes use to solve this problem. Lobbying or legislative bargaining may allow the minority to express the magnitude of its preferences, against the prediction of the median voter theorem. Also, where there are multiple political jurisdictions, individuals may relocate to communities that more closely match their ideal bundle of social goods. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). Each of these solutions, however, has various limitations, and some government failure is likely to remain.

17. See generally WEISBORD, *supra* note 15 (arguing that government failure is one reason that private charities are needed).

18. An allocation of resources is Pareto efficient when no reallocation can satisfy someone’s preferences more without reducing the satisfaction of someone else. See ROBERT D. COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 17 (5th ed. 2008).

badly.¹⁹ Unlike private donors, individual taxpayers have no unilateral power to direct how their funds are used. The uses of funds by the state are too diffuse for individual taxpayers to feel responsible for monitoring any particular expenditure. Instead of citizens, interest groups with questionable motives monitor the state's expenditures on particular goods.

B. Normative Failure

Surveys find that people who reach a threshold level of income believe they ought to donate something to others.²⁰ Charity is praised and stinginess is condemned.

A social norm can be understood as an obligation backed by informal sanctions.²¹ Obligations state what people *ought* to do.²² Informal sanctions for neglecting obligations include blame, criticism, disapproval, exclusion and shunning. Widespread praise for charity and blame for penury demonstrates the existence of a social norm of charity. This is true even though many people disagree or remain uncertain about the appropriate amount to give, and some give nothing.

Theory provides a clear reason to explain why some people give nothing: their charity is unobservable. As Katz writes, norms "cannot be followed unless information is transmitted regarding their substantive content; they cannot be enforced unless information is

19. For a useful proposal on how to strengthen monitoring and avoid abusive charities, see Aaron S. Edlin, *The Choose-your-Charity Tax: A Way to Incentivize Greater Giving*, ECONOMISTS' VOICE, 2005, at 1 (on file with the University of Michigan Journal of Law Reform), available at <http://www.bepress.com/ev/vol2/iss3/art3>. See also WEISBROD, *supra* note 15; Cagla Oken & Burton Weisbrod, *Determinants of Donations in Private Nonprofit Markets*, 75 J. POL. ECON. 255 (2000) (showing that donors consider the financial performance of nonprofits before contributing).

20. See *supra* note 3.

21. See Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 954 n.33 (1997). This definition follows the imperative tradition in jurisprudence, which defines law as an obligation backed by state sanction. See H.L.A. HART, *THE CONCEPT OF LAW* 107–14 (1961); JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM* 147–56 (2d ed. 1980). In the case of a social norm, however, the obligation generally is not enforced by the state.

22. An obligation is distinct from an inclination that is followed out of self-interest. To illustrate this distinction, men have an obligation to take off their hats in church, and congregants criticize a man who keeps his hat on his head. On the other hand, men have no obligation to take off their hats in a boiler room, but regularly do so anyway, presumably following an inclination to cool their heads. A man who keeps his hat on in a boiler room may seem odd to others, but they do not blame him or think that he did wrong. For more on this distinction and alternative definitions of a social norm, see Richard McAdams & Eric Rasmusen, *Norms in Law and Economics*, in 2 HANDBOOK OF LAW AND ECONOMICS 1573, 1576–78 (A. Mitchell Polinsky & Steven Shavell eds., 2007).

transmitted regarding who has obeyed them, who has violated them, and who is to impose any associated punishment or reward.”²³ Philanthropy remains stunted by an inability to observe who has violated the charitable norm.

The nature of charity causes this information deficit. Most people believe that they ought to be charitable, but no one thinks that he or she is obligated to help every charitable cause whenever the opportunity presents itself. A moral individual can pick and choose where and when to donate. We characterize charity as an obligation to donate to “A or B or C or . . .,” but not necessarily to anyone in particular. In this sense, the charitable obligation is *disjunctive*. By contrast, the obligation not to lie is conjunctive, because it is ordinarily owed to everyone. A conjunctive obligation is owed to “A and B and C and . . .”

“Conjunctive” and “disjunctive” are familiar grammatical forms, which is why we use them here. Philosophers, however, have made a similar distinction between “perfect” and “imperfect” duties. According to Immanuel Kant, a perfect duty—similar to a conjunctive obligation—must be performed whenever the relevant condition arises.²⁴ By contrast, an imperfect duty—similar to a disjunctive obligation—must be performed at least some of the time, but it does not need to be performed on every possible occasion. Kant uses the duty of charity as an example of an imperfect duty.²⁵

The distinction between conjunctive and disjunctive obligations is not new to philosophers, but philosophers do not address the differences in information necessary to enforce each type of obligation. *Centralized* information is required to know whether or not someone has discharged a disjunctive obligation. The newsletter of a nonprofit organization might disclose the names of people who donated to it in the past year. If a particular individual is not listed, one cannot conclude that she is uncharitable, as she may have donated generously to other organizations. To determine that she violated the norm, one would need to observe that she did not

23. Avery Katz, *Taking Private Ordering Seriously*, 144 U. PA. L. REV. 1745, 1749 (1996).

24. THOMAS E. HILL, JR., DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY 149 (1992). Kant distinguishes between perfect duties owed to oneself and perfect duties owed to others. To illustrate a perfect duty owed to others, Kant argues that we have a perfect duty to refrain from making lying promises. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 31–33 (Mary Gregor trans., Cambridge Univ. Press 1998).

25. KANT, *supra* note 24, at 33. Charity is an example of an imperfect duty owed to others. In Kant's framework, the duty only applies to other rational beings, potentially creating some differences between Kant's definition of an imperfect duty to others and our definition of a disjunctive obligation.

donate a sufficient amount to anyone over a given period of time.²⁶ In technical terms, falsifying the statement “(A or B or C or . . .)” requires a showing that “((not A) and (not B) and (not C) and . . .).” To determine if the norm was violated, aggregate information must be collected on an individual’s donations. Only after aggregation is it fair to accuse someone of penury.

In contrast, proving violation of a conjunctive obligation only requires a single observation. Observing someone telling a lie is sufficient to conclude that the norm—“Do not lie”—was broken. In technical terms, falsifying the statement “B” is sufficient to falsify the statement “A and B and C and” The information that an individual lied on a particular occasion can be obtained by people who observed the event. The people who observe the lie do not need more information to criticize the liar. Decentralized information is sufficient to sanction violations of conjunctive obligations.²⁷

Benjamin Franklin allegedly said, “It takes many good deeds to build a reputation, and only one bad one to lose it.”²⁸ He must have had conjunctive obligations in mind. For disjunctive obligations, the public must observe an aggregation of bad deeds before an individual’s reputation is harmed. In the modern world, aggregate information about individual contributions is not disclosed for most people. Public criticism for being uncharitable falls on a few rare individuals like Al Gore, who disclose their aggregate giving.

26. Philanthropy is also disjunctive with respect to time. Donations can be made at: “ t_1 or t_2 or t_3 . . .” where each t_i represents a point in time. If we observe that someone does not donate at any one particular time, this does not demonstrate that she is uncharitable, as she may have contributed at some other point in time. To know that she violated the charitable norm, we would need to observe that she never donates, or donates with insufficient frequency or in an insufficient amount. If the time when a donation should be made were clearly specified it would be easier to detect violations of the norm. We could simply monitor an individual’s actions at the appropriate time to determine whether she complied with or violated the norm. When timing is not specified we need to observe an individual’s actions over a broad period of time during which the obligation could be fulfilled. Assuming charity is an annual obligation, for example, we would need to see each individual’s contributions over an entire year. The charitable obligation is particularly problematic since it is disjunctive with respect to both the recipient and the timing of the donation—meaning we need aggregate information in both dimensions.

27. One of the distinguishing features of a charity is the absence of a right-holder entitled to receive one’s contribution. This feature of charity distinguishes it from most other obligations which correlate directly with another party’s right-claim. To illustrate, a tenant’s *duty* to pay rent to a landlord implies that the landlord has a *right* to receive rent from the tenant. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 717–20 (1917); see also Feinberg, *supra* note 6, at 244 (noting that the logical correlation between rights and duties does not apply to charity). The absence of a right-holder helps explain why decentralized information cannot support the charitable obligation.

28. TERRELL G. HERRING, MARCHING ORDERS FOR LEADERSHIP SUCCESS 60 (2007).

Unlike criticism, praise may be justified by a single donation. Charities publish lists of donors distinguished by their level of giving, and they bestow praise and honor on large donors. The mechanism for sustaining charity among most people is praise of generosity, not criticism of penury.²⁹ As will be shown in the next Section, relying on praise yields a low level of donations from most people.

Our analysis of charity reveals a parallel between markets and norms. Markets work well when prices fully capture social costs. Conversely, markets fail when social costs escape prices, as with pollution from a factory.³⁰ Similarly, social norms direct behavior through sanctions. Social norms work well when decentralized processes provide all the information necessary for effective sanctioning, as with many conjunctive norms.³¹ In contrast, social norms fail when decentralized processes do not supply enough information for individuals to sanction wrongdoers, as with disjunctive norms. The theory of normative failure regards law as ideally correcting failures in spontaneous order in norms, much like the theory of market failure regards regulations as ideally correcting a failure in markets.³² The spontaneous order for disjunctive norms is likely to fail and need correction by law.

29. Observing one generous donation allows praise. A donation, say, to "B" is sufficient to prove that a person gave to "A or B or C or . . ." In general, a single event can discharge a disjunctive obligation and elicit praise. In contrast, proving that a person discharged a conjunctive obligation to "A and B and C and . . ." requires observing discharge for "A" and discharge for "B" and discharge for "C" and . . . This table summarizes our discussion about information and the two kinds of norms:

	<i>Information to detect violation and elicit blame</i>	<i>Information to detect compliance and elicit praise</i>
<i>Disjunctive Obligation</i>	Aggregate	Single observation
<i>Conjunctive Obligation</i>	Single observation	Aggregate

30. See COOTER & ULEN, *supra* note 18, at 101–04.

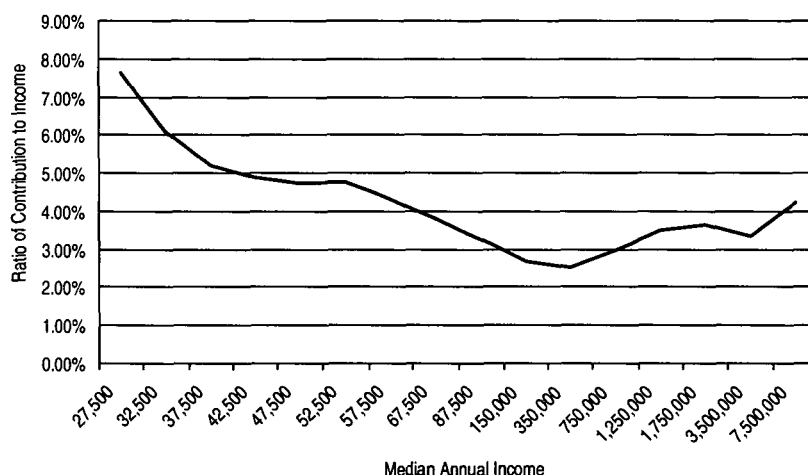
31. See, e.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Stewart MacAuley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

32. See Cooter, *supra* note 21; Katz, *supra* note 23. When norms fail, law may improve the situation by strengthening a beneficial social norm, suppressing a harmful social norm, or inducing a missing norm. For example, McAdams argues that privacy regulations can prevent the formation and enforcement of intrusive and socially undesirable norms relating to sexual or religious orientation. Richard McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 424–26 (1997). Interestingly, the problem studied by McAdams is the converse of the problem in philanthropy. Intrusive norms pertaining to sexual and/or religious orientation cannot be effective unless society has some way to observe each individual's sexual and religious orientation. Privacy laws prevent the dissemination of such information, and thus can help suppress the development and enforcement of undesirable norms. Conversely, in the context of philanthropy, we argue that

C. Data on Giving

Available data on donations in the United States confirms our prediction that the charitable norm will be ineffective. Figure 1 presents data from tax returns submitted to the Internal Revenue Service showing the average ratio of deductible contributions to adjusted gross income for itemizing U.S. taxpayers in 2003.³³ Beginning at almost 8% for poor people, the percentage of income donated to charity falls to roughly 2.5% for the upper middle class. Figure 1 thus suggests that donations are *regressive* over their lower range. Donations rise to over 4% among the wealthy, which suggests that donations are *progressive* over their higher range.

FIGURE 1
CONTRIBUTION RATIOS FOR ITEMIZING
TAXPAYERS IN 2003



law can foster the dissemination of information necessary to support the development and enforcement of a desirable norm.

33. Data is from IRS, *Table 2.1—2003: Individual Income Tax Returns with Itemized Deductions: Sources of Income, Adjustments, Itemized Deductions by Type, Exemptions, and Tax Items, by Size of Adjusted Gross Income*, <http://www.irs.gov/taxstats/indtaxstats/article/0,,id=134951,00.html>, under Table 2.1—2003 (on file with the University of Michigan Journal of Law Reform).

The data in Figure 1 is useful because it encompasses so many people—all taxpayers who *itemize* their deductions.³⁴ Even so, it excludes many people—all taxpayers who take the *standard deduction*.³⁵ In 2003, two-thirds of U.S. households took the standard deduction.³⁶ These two groups of people differ with respect to their charitable contributions. Taxpayers who make unusually large donations tend to itemize because their actual donation yields a larger tax deduction than the standard deduction. Consequently, data on donations by itemizers alone (as shown in Figure 1) likely overestimates donations by people in general. This is especially true for low-income taxpayers, because far fewer itemize their deductions than high-income taxpayers. Selection biases the curve upward in Figure 1, and this effect is large for low-income households and small for high-income households.

Survey data gives a more representative picture of charitable contributions. Surveys confirm the above noted selection bias, finding that the average itemizing taxpayer donated 3.2% of annual income, while the average non-itemizer donated 1.5%.³⁷ Furthermore, numerous studies show that the average household, across almost all levels of income, donates approximately 2% of its annual income.³⁸ Households with very high annual income (above \$5,000,000 per year) give a significantly higher fraction of their income,³⁹ but such households constitute a very small percentage of the U.S. population.⁴⁰ Averaging combines a few households that give a lot and many households that give nothing. Consequently,

34. Itemizers list their gifts to charities and other deductions explicitly on their tax return and then subtract the total from taxable income.

35. They deduct an amount stipulated by the tax authorities that is independent of their actual donations. The tax authorities have no information on actual donations by taxpayers who take the standard deduction.

36. See IRS, *Table A—Selected Income and Tax Items for Selected Years 1990–2007*, <http://www.irs.gov/taxstats/indtaxstats/article/0,,id=134951,00.html> (on file with the University of Michigan Journal of Law Reform). In 2003, there were 130,423,626 individual tax returns filed. Of this amount, 43,949,591 (or 35%) filed itemized returns and the remaining 84,643,281 (or 65%) took the standard deduction.

37. See NONPROFIT ALMANAC, *supra* note 12, at 64. Survey data is the only source of information for donations by non-itemizers.

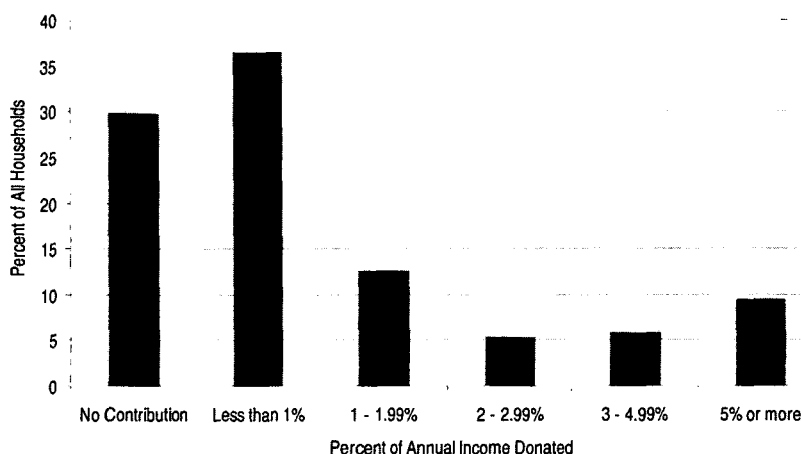
38. See GIVING USA 2003, *supra* note 14, at 201 (finding an annual contribution ratio of around 2% every year between 1962 and 2002, with a low of 1.54% (in 1995) and a high of 2.26% (in 1963)); GIVING AND VOLUNTEERING STUDY, *supra* note 3, at 45 (reporting results from 1993, 1995 and 1998 that show contribution ratios between 1.6% to 2.3% for most income levels surveyed).

39. Households with income over \$5,000,000 donate more than 4% annually. See *supra* Figure 1; see also Debra Blum, *Giving by Rich Rises to 8% of Income*, CHRON. PHILANTHROPY, Dec. 5, 1998, at 15.

40. Separate social norms may govern the philanthropy of the ultra-wealthy. See, e.g., FRANCIE OSTROWER, *WHY THE WEALTHY GIVE: THE CULTURE OF ELITE PHILANTHROPY* 5–7 (1997).

the average donation (2%) is *not typical*. Figure 2 shows the distribution of U.S. household contribution levels.⁴¹ Instead of a bell-shaped curve, the distribution is skewed to the left. Between a quarter and a third of the population does not donate,⁴² and the median contribution is less than 1%.⁴³

FIGURE 2
DISTRIBUTION OF HOUSEHOLD
CONTRIBUTION LEVELS IN 1998



Source: Independent Sector, *Giving and Volunteering in the United States, 1999* (Washington: Independent Sector, 1999), chap. 1, pp. 38–39.

41. GIVING AND VOLUNTEERING STUDY, *supra* note 3, at 42.

42. See GIVING USA 2003, *supra* note 14, at 174 (citing reports finding that approximately 75% of households surveyed reported contributing to charity in the past 12 months); CENTER ON PHILANTHROPY AT INDIANA UNIVERSITY, KEY FINDINGS: CENTER ON PHILANTHROPY PANEL STUDY (2008), <http://www.philanthropy.iupui.edu/Research/Key%20Findings%20January%202008.pdf> (on file with the University of Michigan Journal of Law Reform) (finding that approximately 70% of U.S. households donated to charity in 2004); GIVING AND VOLUNTEERING STUDY, *supra* note 3, at 30 (reporting survey results from 1987 to 1998 showing that approximately 70% of U.S. households donate; surveys were done in 1987, 1989, 1991, 1993, 1995, and 1998, and over these years the percent of people donating ranged from 68.5% (in 1995) to 75.1% (in 1989)). For an explanation of the research methodologies used in different surveys, see Mark Wilhelm, *The Distribution of Giving in Six Surveys* (Nov. 2002) (unpublished manuscript, on file with the University of Michigan Journal of Law Reform), available at <http://www.philanthropy.iupui.edu/Research/WorkingPapers/SurveyComparisons-Wilhelm.pdf>.

43. The median was less than 1% for every year surveyed by Independent Sector from 1987 through 1998. See GIVING AND VOLUNTEERING STUDY, *supra* note 3, at 30, 39.

Efforts to understand this wide variation link contributions to several factors. Econometric studies of charitable contributions identify the characteristics of people who donate generously. Using data from tax returns, the studies find that the following explanatory variables have a positive effect, *ceteris paribus*, on annual contributions: (i) income,⁴⁴ (ii) age, (iii) wealth, (iv) volunteering, (v) being married, (vi) participating in religious activities, (vii) education level, and (viii) the marginal tax rate.⁴⁵ None of these studies concern the variable that we regard as most important—information about donations.

II. PUBLICITY

To explain how law can increase donations, we first distinguish two types of motivation for charity: internal and external. Internal motives for donating include the desire to do right for its own sake, achieve nobility, avoid feelings of guilt, escape the fires of hell, fulfill a prior commitment, and express sympathy for others. For our

44. The dependent variable in these studies is the *total* amount donated in the relevant year, not the contribution ratio. So, the fact that income is positively correlated with contributions does not imply that people with a higher annual income donate a higher percent of their income.

45. See CHARLES T. CLOTFELTER, *FEDERAL TAX POLICY AND CHARITABLE GIVING* 56–59 (1985) (summarizing several studies done in the 1970s and 1980s showing positive coefficients for income, age, marital status, wealth and education); Gerald E. Auten, Holger Sieg & Charles T. Clotfelter, *Charitable Giving, Income, and Taxes: An Analysis of Panel Data*, 92 AM. ECON. REV. 371 (2002); Kevin S. Barrett, *Panel-Data Estimates of Charitable Giving: A Synthesis of Techniques*, 44 NAT'L TAX J. 365 (1991) (finding positive coefficients for income, marital status, and age); Kevin Stanton Barrett, Anya M. McGuirk & Richard Steinberg, *Further Evidence of the Dynamic Impact of Taxes on Charitable Giving*, 50 NAT'L TAX J. 312 (1997) (finding positive coefficients for income and marital status); William C. Randolph, *Dynamic Income, Progressive Taxes, and the Timing of Charitable Contributions*, 103 J. POL. ECON. 709 (1995) (finding positive coefficients for income, age, and marital status). All studies find a negative coefficient for the tax-price of donating one dollar. This is equivalent to a positive coefficient for the marginal tax rate, since the tax-price equals one minus the marginal tax rate. See *infra* notes 96–99. Volunteering is studied less frequently, since volunteering data cannot be accessed via tax returns; however, surveys have found that volunteering time and donating money are complementary activities. See CLOTFELTER, *supra*, at 170; GIVING AND VOLUNTEERING STUDY, *supra* note 3, at 30; Eleanor Brown & Lankford Hamilton, *Gifts of Money and Gifts of Time: Estimating the Effects of Tax Prices and Available Time*, 47 J. PUB. ECON. 321 (1992); Richard F. Dye, *Contributions of Volunteer Time: Some Evidence on Income Tax Effects*, 33 NAT'L TAX J. 89 (1980). Similarly, religious participation is not included in studies based on tax return data; however, surveys have found a positive link between religious participation and the likelihood and amount of charitable contributions. See GIVING AND VOLUNTEERING STUDY, *supra* note 3, at 84; Arthur C. Brooks, *Religious Faith and Charitable Giving*, POL'Y REV., Oct. & Nov. 2003, <http://www.hoover.org/publications/policyreview/3447051.html> (on file with the University of Michigan Journal of Law Reform); Suzanne Heller Clain & Charles E. Zech, *A Household Production Analysis of Religious and Charitable Activity*, 58 AM. J. ECON. & SOC. 923 (1999).

purposes, a motive is internal if it causes an actor to donate regardless of whether the behavior is observed. Publicity is irrelevant to an actor's internal motivation. When nobody observes a gift, the actor can expect no extrinsic reward from giving and no extrinsic sanction from not giving. The amount that a person is willing to donate when no one observes the gift indicates his internal commitment to charity.⁴⁶ Individuals can internalize an obligation to varying degrees, with some willing to donate much and others unwilling to donate anything for intrinsic reasons alone.

In contrast, external motives might include the hope of social rewards for donating, or the fear of social sanctions for not donating.⁴⁷ For our purposes, a motive is external if it causes a person to donate only when someone else is watching. Publicity is necessary to activate external motives. As observed donations to charity increase, criticism by others mutes and praise amplifies. Thus Al Gore was criticized for donating 0.2% of his income in 1997, but enjoyed some praise for donating almost 7% in 1998. Public donations can create a reputation for generosity with many indirect benefits.

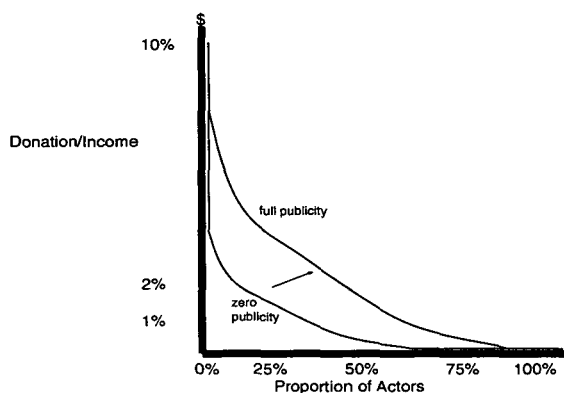
The total motivation for charity often combines internal and external motives. Figure 3 represents these facts in a graph. The vertical axis indicates the percentage of income a person is willing to donate to charity. The horizontal axis indicates the number of people who are willing to donate.⁴⁸ According to our theory, donations depend on the extent of publicity. The two curves shown in Figure 3 represent the extremes of zero publicity and full publicity.

46. See Cooter, *supra* note 21, at 955–58; Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1581–84 (2000). Other measures are possible, including the willingness to criticize others who do not fulfill their charitable obligations. For this Article, we avoid the usual economic language of “tastes,” “preferences,” and “utility” to describe the internal dimension of an obligation. These terms work well in the context of acts aimed at benefiting the actor, but they create unnecessary confusion in the context of acts aimed at benefiting others.

47. See McAdams & Rasmusen, *supra* note 22, at 1578–81. McAdams and Rasmusen divide external obligations into two general categories (with considerable overlap): actors are motivated (i) to avoid sanctions with material consequences, such as loss of business and (ii) by a subjective desire for approval/esteem from others even if there is no material consequence. The second category is sometimes overlooked since it does not necessarily involve a tangible sanction. Yet actors may care how their actions are perceived, regardless of whether there is a tangible consequence. One can think of this as a taste for status or social approval. The second type of external obligation can operate even if third parties do not actually express their disapproval. Expression of disapproval (i.e., censure) is merely evidence of how others perceived the conduct. The common element in both types of external obligations is that the underlying conduct must be observed by another person. We incorporate both categories into our definition of an external obligation and often designate the first category as a sanction and the second as social approval.

48. To be precise, the curves represent cumulative density functions.

FIGURE 3
MIXED-MOTIVE CHARITY



At zero publicity, internal motives are everything and external motives are nothing. When only internal motives operate, few people will donate very much. Thus approximately 10% of people will donate at least 2% of their income. The intersection of the zero-publicity curve with the horizontal axis at approximately 60% indicates that approximately 60% of people will donate something and approximately 40% will donate nothing when unobserved.

As publicity increases, external motives supplement internal motives. The two kinds of motives operate in tandem to determine the extent of charitable giving.⁴⁹ In Figure 3, publicity shifts the donation curve to the right, implying that more people give more money.⁵⁰ Starting from “no publicity,” additional publicity shifts the curve to the right until it reaches the curve labeled “full publicity.” At full publicity, external motives reach their full potential and overall motivation is strongest. The full-publicity curve in Figure 3 indicates that approximately 40% of people donate at least 2% of their income and 80% donate something. The specific numbers in Figure 3 are hypothetical, but Figure 2 (above) suggests they are realistic.⁵¹

49. Publicity increases charitable giving in aggregate. Some people may feel that it is immodest to make donations that elicit praise, in which case publicity could cause them to give less. The evidence cited in this Article, however, suggests that publicity sharply increases giving in aggregate, so such people must be statistically unusual.

50. In the next Section we consider behavioral economic experiments that address this issue.

51. The shape of the curve is roughly consistent with the data shown in Figure 2.

Perhaps the law can change the distribution of internalized values by such means as childcare, education, advertising, and exhortation. Changing the extent of internalization, however, is not our subject. Instead, we focus on how law can increase donations without changing the actual distribution of internalized values. As Figure 3 illustrates, law can increase donations by increasing publicity.

A. Behavioral Studies of Voluntary Donations

Figure 3 depicts a large increase in charitable giving caused by additional publicity. Experiments performed by psychologists and economists provide evidence that the increase is large in fact. Researchers have studied voluntary contributions in two settings: cooperative and distributive. In the cooperative setting, subjects make voluntary contributions to a "public good" that is shared among all the participants. In a typical public goods experiment, a group of four or more subjects receive "tokens" that are exchanged for money at the completion of the experiment.⁵² Each subject can either keep her entire allocation of tokens, or contribute a portion to a public good. The group's payoff is maximized when each subject contributes all of her tokens to the public good. Thus cooperation is in the group's interest. However, contributing nothing and free-riding on the contributions of others maximizes the individual's payoff. Non-cooperation is in the individual's narrow self-interest. The best outcome for each individual is for everyone to cooperate except herself.⁵³ In technical terms, the public goods experiment is an n -person prisoner's dilemma.

Alternatively, the dictator game is used to study distributional norms.⁵⁴ In the dictator game, there are two players. Player 1 is given an initial allocation of tokens or money. She is then given the opportunity to keep her entire allocation or share some portion of it with player 2, who was not given an initial allocation. The dictator game measures the norm of fairness (i.e., an equal distribution between the two players) in different settings. By acting fairly, an individual benefits others and disadvantages herself.

52. See, e.g., Ernst Fehr & Simon Gächter, *Cooperation and Punishment in Public Goods Experiments*, 90 AM. ECON. REV. 980, 982 (2000).

53. See *id.* at 980.

54. See Elizabeth Hoffman, Kevin A. McCabe & Vernon L. Smith, *Behavioral Foundations of Reciprocity: Experimental Economics and Evolutionary Psychology*, 36 ECON. INQUIRY 335, 340-44 (1998). Some experiments also use an ultimatum game to study distributional norms; however, the ultimatum game creates an incentive for strategic behavior that potentially undermines certain results.

Experiments yield similar results in both settings: Publicity increases contributions in the public goods game and the dictator game. One form of publicity is observation of how much others give. Numerous studies show that subjects donate more when their contributions are observable.⁵⁵ Hoffman, McCabe and Smith varied the level of anonymity by creating a double-blind treatment, where an individual's contributions were completely anonymous with respect to the experimenter and the other participants, and a single-blind treatment, where the individual's contributions were anonymous with respect to the other participants but were observed by the experimenter. They found significantly higher contributions in the single-blind treatment (offering partial anonymity), as compared with the double-blind treatment (offering full anonymity).⁵⁶ Experiments that made contributions transparent to all parties produced even higher levels of contribution.⁵⁷ In these experiments, observation of one's contribution exposed the donor to blame or praise, but not to monetary sanctions.

Another aspect of publicity is discussion. Experiments have shown that subjects donate more when they can communicate with others before deciding on their contribution. In a public goods experiment, Isaac and Walker gave participants the opportunity to talk to each other before making their contribution.⁵⁸ After talking, the participants made anonymous donations. Since the donations were anonymous, talk was "cheap"—devoid of any materially binding commitments. Even so, the ability to communicate led to significantly higher contributions. Communication reinforces a norm of high contributions and signals one's willingness to cooperate.

Beyond publicity alone, people can sometimes punish others for making a low contribution. In a series of public goods

55. See Iris Bohnet & Bruno Frey, Comment, *Social Distance and Other-Regarding Behavior in Dictator Games*, 89 AM. ECON. REV. 335 (1999); Hoffman, McCabe & Smith, *supra* note 54; Elizabeth Hoffman, Kevin McCabe & Vernon Smith, Reply, *Social Distance and Other-Regarding Behavior in Dictator Games*, 86 AM. ECON. REV. 653 (1996) [hereinafter Hoffman, McCabe & Smith, Reply]; Elizabeth Hoffman et al., *Preferences, Property Rights and Anonymity in Bargaining Games*, 7 GAMES & ECON. BEHAV. 346 (1994); R. Mark Isaac & James Walker, *Communication and Free-Riding Behavior: The Voluntary Contribution Mechanism*, 26 ECON. INQUIRY 585 (1988) [hereinafter Isaac & Walker, *Communication*]; R. Mark Isaac & James M. Walker, *Group Size Effects in Public Goods Provision: The Voluntary Contribution Mechanism*, 103 Q. J. OF ECON. 179 (1988); R. Mark Isaac, James M. Walker & Susan H. Thomas, *Divergent Evidence on Free Riding: An Experimental Examination of Possible Explanations*, 43 PUB. CHOICE 113 (1984).

56. See Hoffman, McCabe & Smith, Reply, *supra* note 55.

57. See Bohnet & Frey, *supra* note 55 (finding high contributions in the two way identification).

58. Isaac & Walker, *Communication*, *supra* note 55, at 590.

experiments, Fehr and Gächter let subjects observe each individual's contribution and then decide whether or not to impose punishment.⁵⁹ These experiments were conducted over multiple rounds, with punishment opportunities available to some, but not all, experimental groups. Punishment reduced the payoff to both the punisher and the punished. "No punishing" was the dominant strategy for narrowly self-interested subjects. Even so, Fehr and Gächter found that people were willing to punish selfish behavior. The experiments found that a "subject is more heavily punished the more his or her contribution falls below the average contribution of other group members."⁶⁰ A person avoids punishment by making a contribution above the average in the group. Average contributions were significantly higher in the treatments where punishment opportunities were available. The possibility of punishment motivated higher group contribution levels. In contrast, the treatment groups that did not allow punishment converged toward "no contributions" after several rounds. Punishment proved essential to sustain high levels of contribution,⁶¹ which suggests that social norms will erode over time unless supported by sanctions.⁶²

In the preceding experiment, people who were denied the benefit of a donation sanctioned the person who refused to give. In the real world, the beneficiaries of charity can seldom sanction those who do not donate.⁶³ Instead, sanctions are likely to come from friends, colleagues, family members, journalists, and other independent parties. To design an experiment that more closely

59. See Fehr & Gächter, *supra* note 52.

60. *Id.* at 990.

61. These experiments were replicated in a different setting by David Masclet, Charles Noussair, Steven Tucker, and Marie-Claire Villeval. Masclet et al., *Monetary and Nonmonetary Punishment in the Voluntary Contributions Mechanism*, 93 AM. ECON. REV. 366 (2003). Masclet et al. replaced the monetary sanction that Fehr and Gächter used with a non-monetary sanction. They gave subjects the ability to express disapproval of a participant's contribution, instead of a monetary fine. They found the same results as Fehr & Gächter, *supra* note 52 (though they did not find as high a level of cooperation). External obligations may be enforced by a material sanction, but can also be supported by disapproval.

62. See Fehr & Gächter, *supra* note 52; see also Ernst Fehr & Urs Fischbacher, *Social Norms and Human Cooperation*, 8 TRENDS COGNITIVE SCI. 185 (2004). One criticism of the Fehr and Gächter study, which the authors corrected in the subsequent work, is that the experimental subjects may have been partially motivated by strategic considerations. For instance, a subject might selfishly decide to sanction another participant in the expectation that this will lead to higher contributions from the other participants in later rounds. These considerations limit the applicability of the original Fehr and Gächter experiment.

63. To be sure, sometimes the potential recipient can sanction the potential donor. For instance, if a religious individual fails to donate anything to his church, he may be criticized by members of the church who might have benefited indirectly from his donation. But most examples of philanthropy do not share this feature.

resembles actual philanthropic giving, the recipient of philanthropy should not be in a position to punish the donor. To solve this problem, Fehr and Fischbacher designed a third party punishment experiment.⁶⁴ Their experiment was similar to that conducted by Fehr and Gächter, except that they gave the power to punish to disinterested third parties. The third parties received no benefit from the contributions of others, and punishment remained costly. In both public goods and dictator games, Fehr and Fischbacher found that third parties were willing to punish low contributors.

In sum, psychology experiments show that observation and external sanction have significant effects on behavior. With complete anonymity and no threat of sanction, people generally do not donate very much. When contributions are transparent and sanctions are introduced, the average contribution is significantly increased. Instrumental considerations apparently play a significant role in charitable giving.

Laboratories differ from life in several ways that could taint experimental results.⁶⁵ First, experiments typically employ small amounts of money, which may blunt the effect of self-interest and enhance altruism. Studies using larger financial rewards often find that average contributions are lower⁶⁶ and vary less.⁶⁷ Second, games played with strangers may not reflect internal commitments to reputable charities or familiar people in need. Along these lines, Eckel and Grossman found that subjects were willing to donate more to a known charity than an unknown subject.⁶⁸ Despite such limitations, laboratory experiments isolate the effect that

64. See Ernst Fehr & Urs Fischbacher, *Third Party Punishment and Social Norms*, 25 *EVOLUTION & HUM. BEHAV.* 63 (2004).

65. For an overview of the limitations of laboratory-based and field-based behavioral experiments, see Glenn Harrison & John List, *Field Experiments*, 42 *J. ECON. LIT.* 1009 (2004).

66. For a description of several studies, see Colin Camerer & Robin Hogarth, *The Effects of Financial Incentives in Experiments: A Review and Capital-Labor-Production Framework*, 19 *J. RISK & UNCERTAINTY* 7, 34 (1999). This finding holds in the dictator game setting. See Robert Forsythe et al., *Fairness in Simple Bargaining Experiments*, 6 *GAMES & ECON. BEHAV.* 347 (1994). Increasing the financial stakes, however, does not affect behavior in ultimatum games. See Camerer & Hogarth, *supra*, at 20; Paul G. Straub & J. Keith Murnighan, *An Experimental Investigation of Ultimatum Games: Information, Fairness, Expectations, and Lowest Acceptable Offers*, 27 *J. ECON. BEHAV. & ORG.* 345 (1995).

67. For a review of 74 behavioral experiments using different financial incentives, see Camerer & Hogarth, *supra* note 66.

68. Catherine C. Eckel & Philip J. Grossman, *Altruism in Anonymous Dictator Games*, 16 *GAMES & ECON. BEHAV.* 181, 188 (1996); see also Dan Ariely, Anat Bracha & Stephen Meier, *Doing Good or Doing Well? Image Motivation and Monetary Incentives in Behaving Prosocially* (IZA Discussion Paper No. 2968; FRB of Boston Working Paper No. 07-9, 2007) (on file with the University of Michigan Journal of Law Reform), available at <http://ssrn.com/abstract=1010620> (showing the effect of publicity versus money in donations to the Red Cross).

observation, communication, and threat of punishment have on contribution levels. These studies suggest that external motives created by publicity may have a large effect on charitable contributions. The next Section considers evidence from outside the laboratory, which confirms that publicity increases charity.

B. Religious Organizations

Some religious organizations demonstrate a relatively clear norm of charity. For example, the Judeo-Christian tradition connects charity with the obligation to tithe, or give 10% of one's income to the Lord.⁶⁹ Islamic communities encourage charitable donations through Zakat, the obligation to annually donate 2.5% of one's total assets.⁷⁰ Religious organizations use sermons and teaching to remind their members of the charitable obligation. Some religious organizations also have mechanisms for enforcing those obligations. The Church of Jesus Christ of Latter-Day Saints (the Mormon/LDS Church) provides an example of successful enforcement of the tithe. To participate in important religious ceremonies, a Mormon must annually state to a lay-official of the church that he has "paid a full tithe."⁷¹ A member who has not done so cannot participate in important religious ceremonies. Exclusion from these ceremonies is an effective sanction within the LDS community.⁷²

Other organizations also make charity a regular part of religious life, which affects donations. Regardless of creed, a higher propor-

69. Examples of tithing are prominent in the Bible. For example, Abraham reportedly gave 10% of his wealth to the high priest, 14 *Genesis* 18:20, and Jacob promised to give 10% of his earnings to God, 28 *Genesis* 20:22.

70. See, e.g., Timur Kuran, *Islamic Redistribution through Zakat, Historical Record and Modern Realities*, in *POVERTY AND CHARITY IN MIDDLE EASTERN CONTEXTS* 275, 280, 285 (Michael Bonner, Mine Ener & Amy Singer eds., 2003). The actual obligation may differ somewhat from 2.5% depending on characteristics of the assets that seem arcane today (e.g., the manner of crop irrigation). Differences in interpretation of the Zakat have, in some instances, eroded its positive content.

71. Each Mormon Church has a Bishop, a lay-official, who annually certifies members for participation in special church ceremonies. As part of the certification, a member must assert that he has "paid a full tithe." We are grateful to Paul Edwards for this information. For a statement on tithing among Mormons, see Elder Jeffrey R. Holland, *Like a Watered Garden*, <http://www.lds.org/conference/talk/display/0,5232,23-1-225-13,00.html> (on file with the University of Michigan Journal of Law Reform).

72. For Mormon teachings on tithing and donations, see *Tithes and Offerings*, in *CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, GOSPEL PRINCIPLES* 184 (2009) (on file with the University of Michigan Journal of Law Reform), available at http://www.lds.org/ldsorg/v/index.jsp?locale=0&sourceId=0f1b7befabc20110VgnVCM100000176f620a_&vgnextoid=32c41b08f338c010VgnVCM1000004d82620aRCRD.

tion of religious people than non-religious people donate to charities in the United States. Arthur Brooks ran Probit regressions on the Social Capital Community Benchmark Survey, which consists of 30,000 observations drawn from 30 communities across the United States, and reached this conclusion:

The data show that if two people—one religious and the other secular—are identical in every other way, the secular person is 23 percentage points less likely to give than the religious person and 26 points less likely to volunteer.⁷³

Besides being more likely to donate something, religious individuals make larger donations. Compared to secular individuals, those who regularly attend religious services donate twice as much on average to nonprofit organizations.⁷⁴ Interestingly, religious organizations do not merely increase contributions to their own organization. Religious individuals are also more likely to give to secular nonprofits.⁷⁵

Religious organizations attract donations partly by imposing an obligation that is owed to one organization—the church. Thus the Mormon tithe is an obligation to donate 10% of one's income to the LDS Church. Contributing to other charities is encouraged but cannot satisfy this obligation.⁷⁶ A religious organization can detect and sanction violations of an obligation owed uniquely to it.

Religious organizations can demand loyalty partly because their members believe that the religion offers unique access to profound truths or salvation. In contrast, most people do not feel obligated to participate in any particular secular charity. Although they may feel obligated to participate in *some* charitable organization, they can pick and choose. Without specific obligations, the level of giving to secular charities depends on better enforcement of the disjunctive obligation than an individual charity can achieve on its own, bringing us to the proposed donation registry.

73. Brooks, *supra* note 45.

74. See *id.*; see also GIVING AND VOLUNTEERING STUDY, *supra* note 3, at 84. More detailed data about average contributions is discussed *supra* notes 33–39.

75. Clain & Zech, *supra* note 45, at 928, 941–42.

76. Elder Dallin H. Oaks, *Tithing*, *ENSIGN*, May 1994, at 33 (on file with the University of Michigan Journal of Law Reform), available at http://www.lds.org/ldsorg/v/index.jsp?locale=0&sourceId=10c3425e0848b010VgnVCM1000004d82620a_&vgnextoid=2354fccf2b7db010VgnVCM1000004d82620aRCRD (“We pay tithing, as the Savior taught, by bringing the tithes ‘into the storehouse’ (Mal. 3:10; 3 Ne. 24:10). We do this by paying our tithing to our bishop or branch president. We do not pay tithing by contributing to our favorite charities. The contributions we should make to charities come from our own funds, not from the tithes we are commanded to pay to the storehouse of the Lord.”).

III. DONATION REGISTRY

Making the norm of charity effective requires public information about aggregate giving. To increase publicity, we propose to create a voluntary donation registry on the internet. We first discuss the proposal, then consider steps to implement it. The Internal Revenue Service (IRS) would ideally add an optional box to Form 1040 authorizing disclosure of the taxpayer's contribution ratio. The contribution ratio equals the taxpayer's charitable donations eligible for a tax deduction, divided by adjusted gross income (AGI).⁷⁷ To illustrate, assume that John Doe donates \$4,000 from income of \$100,000 in tax year 2008. If he checks the box authorizing the IRS to disclose his contribution ratio, his entry on the internet registry would look like this:

Tax Year	Name	Contribution Ratio
2008	John Doe	4.0%

Anyone could go online and look up John Doe's entry. Notice that the value of donations and income do not appear in the donation registry—only their ratio.

IRS cooperation in implementing the Donation Registry would be ideal because IRS data on income and contributions is more accurate and extensive than any alternative source.⁷⁸ In addition, the IRS adjusts the categories of AGI and deductible contributions to keep them normatively meaningful. AGI is adjusted to reflect ability to pay taxes, which corresponds to ability to make contributions. Given the political character of taxation, AGI inevitably departs in some ways from real income. Income that is tax-exempt (e.g., municipal bonds), imputed (e.g., household services), non-cash (e.g., bartered), or unrealized investment (e.g., capital gains) is excluded from AGI. Excluding some sources of income from AGI will overstate the taxpayer's contribution ratio, since the denominator will be artificially low.⁷⁹ In spite of imperfections in AGI,

77. This information is already required on the U.S. federal tax return for individuals taking itemized deductions. The ratio can be computed by dividing (i) the amount listed under "Gifts to Charity" Item 18 from Schedule A to Form 1040, by (ii) the amount listed under "Adjusted Gross Income" Item 35 on Form 1040—see I.R.C. § 170 (2006) regarding deductible contributions and I.R.C. § 62 for a definition of adjusted gross income. We discuss problems obtaining donation ratios from tax returns for individuals taking the standard deduction at note 90.

78. IRS audits and the threat of legal sanctions prevent misreporting that generally afflicts self-reporting.

79. For example, a taxpayer who invests in tax-exempt municipal bonds is not required to pay taxes on the interest that such bonds yield. See I.R.S. Instructions to Form 1040 (Line

we are unlikely to find a better measure of a person's ability to make charitable donations.

The same can be said of charitable deductions in the tax code. A taxpayer may list the value of his charitable contributions on his annual income tax form, and he is entitled, within certain limits, to deduct this amount from taxable income.⁸⁰ Deductible contributions can be made in cash or property valued at fair market prices. A donor who expects to receive financial benefit from his contribution can only deduct the value of the contribution minus his personal benefit.⁸¹ Given the legal consequences of mistake or

8b "Tax-Exempt Interest") (on file with University of Michigan Journal of Law Reform), available at <http://www.irs.gov/app/picklist/list/formsInstructions.html> (search for "1040"). Assume the taxpayer has an AGI of \$50,000, but also earned an additional \$50,000 in tax-exempt income. If the taxpayer donates \$2,000 to charity the donation registry would report a contribution ratio of 4%. However, such an individual arguably had real income of \$100,000, in which case the correct contribution ratio would be 2% ($= 2,000 / (50,000 + 50,000)$). The problem with tax-exempt income can be solved easily enough through a small refinement to the donation registry. As tax-exempt income is already required to be disclosed under item 8b on the Form 1040 tax return, the ratio disclosed on the registry could be calculated using the sum of AGI and tax-exempt income as the denominator [i.e. contribution ratio = contributions / (AGI + tax-exempt income)]. While this modification to the registry would appropriately adjust for tax-exempt income, other exclusions from AGI may be more difficult to capture.

80. JOHN K. McNULTY, *FEDERAL INCOME TAXATION OF INDIVIDUALS IN A NUTSHELL* 253 (6th ed. 1999). The tax code places certain restrictions on charitable deductions. A taxpayer's charitable deduction generally cannot exceed 50% of his adjusted gross income. I.R.S. Pub. 526, at 12–14 (on file with the University of Michigan Journal of Law Reform), available at <http://www.irs.gov/formspubs/index.html> (search for "526"). Donations of capital gain property (i.e., stock) are generally limited to 30% of the taxpayer's AGI. *Id.* at 13–14. However, the 30% limitation does not apply if the taxpayer decides to reduce his deduction by the amount that would have been long-term capital gain if he had sold the stock. *Id.* at 14. Also, donations to private foundations, veterans' organizations, nonprofit cemeteries and fraternal societies are limited to 30% of AGI rather than the 50% limit that normally applies. *Id.* Finally, gifts of capital gain property to private foundations, veterans' organizations, nonprofit cemeteries and fraternal societies are limited to 20% of AGI. *Id.* A related problem is presented by taxpayers who pay the alternative minimum tax ("AMT"). Taxpayers cannot take a deduction for charitable contributions that would bring their tax liability below the AMT threshold. The AMT system is designed to prevent excessive tax sheltering. Essentially, an individual's tax liability equals the greater of his (i) regularly calculated tax liability and (ii) AMT liability. See McNULTY, *supra*, at 116.

81. I.R.S. Instructions for Schedule A (Form 1040), Itemized Deductions 9 ("Gifts from which you benefit") (on file with the University of Michigan Journal of Law Reform), available at <http://www.irs.gov/app/picklist/list/formsInstructions.html>. Furthermore, contributions of more than \$250 must be documented by an acknowledgement of the gift from the recipient organization. Also, donations of property valued over \$5,000 must be accompanied by a qualified written appraisal in order to be deducted. See I.R.S. Pub. 526, *supra* note 80, at 15. These recordkeeping requirements may, in some instances, prevent a taxpayer from taking a deduction that she is otherwise entitled to, if the documentation is lost or unavailable. This could cause the donation registry to understate contributions in such instances. However, we do not believe that this is a significant problem. First, most nonprofit organizations automatically provide the required acknowledgement to their donors for recordkeeping purposes. Second, taxpayers have a strong financial incentive to

fraud, the amount claimed as a charitable deduction is credibly accurate.

To be deductible under United States tax law, a contribution must be made to a qualified recipient,⁸² which is often called a "501(c)(3) organization" after the relevant section of the Internal Revenue Code.⁸³ An organization must qualify under one of five categories.⁸⁴ The IRS definition encompasses poverty relief, religion, education, medical services, art, scientific research, and legal aid, among other services. Section 501(c)(3) can be understood as a legislative effort to define and motivate the funding of nonprofits that aim to benefit the public.⁸⁵ However, some nonprofits do not qualify as 501(c)(3) organizations, because they aim primarily to benefit the interests of their members,⁸⁶ or because they aim to influence politics. Nonprofit organizations that do not qualify include labor unions, political parties, and lobbying groups.

People with different political and moral philosophies may disagree about which organizations should qualify under section 501(c)(3). Similarly, people will disagree about which charities to include in the donation registry. Those who focus on poverty may prefer a narrow definition of charity that excludes contributions to the arts, education, and medical research. Secular individuals may

keep track of these records. In fact, these recordkeeping requirements are likely to counterbalance the incentive of taxpayers to *overstate* their charitable contributions.

82. For a general overview of qualified recipient organizations, see I.R.S. Pub. 526, *supra* note 80, at 2 ("Organizations that Qualify to Receive Deductible Contributions"). For a cumulative list of organizations entitled to receive deductible contributions, see I.R.S. Pub. 78 ("Cumulative List of Organizations") (on file with the University of Michigan Journal of Law Reform), available at <http://www.irs.gov/formspubs/index.html> (search for "78").

83. Most nonprofit organizations must qualify under I.R.C. § 501(c)(3). For an organization to qualify under section 501(c) it must initially file an application on Form 1023 for tax-exempt status. Each year thereafter the nonprofit organization is required to file an annual report/tax return with the IRS on Form 990 or Form 990-EZ. The Form 990 creates public disclosure of various revenues and expenses of the organization. Religious organizations, however, are exempt from these filing requirements.

84. I.R.C. § 170(c). The five categories are (i) organizations operated for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children, (ii) war veterans organizations, (iii) domestic fraternal societies, (iv) nonprofit cemetery companies, and (v) the United States or any state or political subdivision.

85. See McNULTY, *supra* note 80, at 253.

86. In this respect, 501(c)(3) organizations are "social" nonprofits, not "private" nonprofits. Note that religious organizations are somewhat of a hybrid between the two, serving both their members and the broader community. On the one hand, money donated to a church is primarily used to support the church infrastructure (i.e., pay salaries, building maintenance, etc.). Jeff Biddle estimates that nearly 70% of the money donated to religious organizations nationwide is used to benefit the organization. See Jeff E. Biddle, *Religious Organizations, in WHO BENEFITS FROM THE NONPROFIT SECTOR?* 92, 93 (Charles T. Clotfelter ed., 1992). On the other hand, religious organizations also perform valuable acts of community service. A church may provide day care for low-income residents in the community or organize a food drive.

prefer to exclude churches. Supporters of public schools may prefer to exclude private schools. Grounds for disputing the scope of the charitable deduction are much the same as for the donation registry.

Disputes about the scope of "true charity" signify plural democracy, not reasons to repeal the charitable deduction or reject the donation registry. The IRS has developed a practical framework for determining the scope of charity in a plural democracy. Some evidence suggests that the broad understanding of philanthropy embodied in the Internal Revenue Code is widely shared.⁸⁷ Certainly, it is widely understood. Taxpayers will immediately know how to evaluate and critique information gained from the donation registry.

The practical case for basing the donation registry on a taxpayer's contribution ratio is strong, but we will mention in passing several limitations and potentially problematic consequences. First, the registry is not adjusted for conditions—family illness, income level, a baby's birth, etc.—that might modify or excuse performance of the charitable obligation. The registry, as proposed above, would report a simple ratio for people of all income levels, regardless of their circumstances.⁸⁸ Second, the registry does not adjust

87. See OSTROWER, *supra* note 40, at 4–8.

88. Perhaps the donation registry should include information other than the contribution ratio. Place of residence might be included, such as town or zip code, in order to reduce ambiguity and help individuals to compare themselves to other similarly-situated people. Employers might be added so that different firms can be compared to each other. Also some very general information about the person's tax bracket might be included, because many people will believe that the contribution ratio should increase with income. For example, rather than listing the taxpayer's ratio of contributions to AGI, a "progressive registry" could list her charitable contributions relative to (i) others in her income bracket, or relative to (ii) a target contribution ratio set for her income level.

While such refinements are certainly possible, the basic contribution ratio should suffice in most cases. People particularly respond to praise and avoid blame from their friends, family, coworkers, religious group, neighbors, or other acquaintances (i.e., in situations where reputation and status matter). If the donation registry supplies the contribution ratio to these people, they will have enough information to adjust praise and blame to individual circumstances (e.g., friends, family and co-workers are likely to know about a family illness or other circumstance that might excuse performance of the charitable obligation). Fortunately, the people with the most information about individuals also have the most influence on them.

Research confirms that praise and blame are most effective within existing relationships. See Simon Gächter & Ernst Fehr, *Collective Action as a Social Exchange*, 39 J. ECON. BEHAV. & ORG. 341, 361–62 (1999) (showing that expressions of approval or disapproval significantly increased contributions when the subjects were familiar with each other, but did not significantly increase contributions when all participants were strangers). Similar results have been noted in non-experimental settings and theorized by academic writers. See, e.g., Amitai Aviram, *A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems*, 22 YALE L. & POL'Y REV. 1 (2004) (explaining the difficulty of spontaneous enforcement of a new private ordering if the participants do not share pre-existing bonds, such as belonging to the same

for variations in contributions from year to year.⁸⁹ Third, the registry does not include taxpayers who do not itemize their deductions. Many of these limitations could be addressed through various refinements to the registry.⁹⁰ For example, the tax form

church, living in the same community, etc.); Richard D. Schwartz, *Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements*, 63 YALE L.J. 471 (1954) (finding that informal sanctions are significantly more effective in a homogenous communal society with a high degree of face-to-face contact, and less effective in a heterogeneous society with less social interaction).

89. Taxpayers sometimes gain tax advantages by lumping contributions in a single year instead of spreading them out. For instance, an individual who is currently in the 35% tax bracket, but expects to fall to the 25% rate next year has an incentive to lump her charitable contributions into the current year. Assume that this individual initially planned to donate \$5,000 this year and another \$5,000 next year. By changing her contributions so that she donates all \$10,000 in the first year and nothing in the second year, she is able to lower her tax bill by \$500. Private foundations and donor-advised funds (DAF) make it easier to time one's charitable contributions and take advantage of differences in marginal tax rates. A DAF is typically managed by a commercial investment company or by a community foundation, and allows the donor to make an irrevocable gift to the fund in one year, and then "advise" the fund as to which charity the donor would like the fund to make a grant to and the timing of the grant. DAFs are not legally obligated to follow the advice of the donor, but for practical purposes will generally do so. The contribution that a donor makes to a DAF should be deducted in the initial year, even if the underlying charities do not receive a grant from the DAF until a later period. For a brief description of the use of DAFs in philanthropy, see Susan A. Ostrander, *The Growth of Donor Control: Revisiting the Social Relations of Philanthropy*, 36 NONPROFIT & VOLUNTARY SECTOR Q. 356, 366-67 (2007).

Tax rules partly address the problem: an itemizing taxpayer must deduct charitable contributions in the tax year that they are made. For these purposes the timing of charitable gift is accounted under the cash method. See I.R.S. Pub. 526, *supra* note 80, at 13. If the taxpayer is subject to deduction caps or AMT liability, however, he is allowed to carryover excess contributions for the next five years. See *id.* at 14, 17. Thus, even if the donation registry does not pick up the contribution in the year that it occurred, it will eventually be counted in most instances. Various fixes could further smooth out uneven contributions, such as registering a five-year average ratio. We see uneven annual contributions as an example of the problem of individual circumstances discussed above.

90. For example, a simple solution is to allow non-itemizers to declare their contributions on their tax return. This statement would serve informational purposes and not change the individual's tax liability. Such disclosure could be made for charitable contributions on Schedule A to Form 1040 exactly as if the individual were itemizing his deductions. The IRS could report the information to the donation registry. Information about the contribution ratio of non-itemizers would be useful, although less accurate and less credible. Non-itemizers have less reason to keep accurate records of their contributions, and the IRS would have less incentive to audit and sanction non-itemizers for inaccurate reporting of contributions. Since information about itemizers would be more accurate than information about non-itemizers, the registry might wish to distinguish between them.

Another reform to stimulate charitable donations would replace the tax deduction with some form of a tax credit. Whereas a tax deduction is subtracted from taxable income, a tax credit is subtracted from tax liability. People who do not itemize their deductions have an incentive to itemize their credits. If a tax credit ever replaces the tax deduction, the tax authorities would gain credible information about the contribution ratio of non-itemizers that it could supply to the donation registry. A version of a tax credit for charitable giving was previously the law. In the early 1980s, non-itemizers were able to deduct a portion of their charitable expenses (up to a dollar cap). CLOTFELTER, *supra* note 45, at 26. A partial

could be revised to allow non-itemizers to declare their contributions for informational purposes, effectively allowing their participation in the registry. While some refinements may be desirable, we emphasize the simplest version of the donation registry. Even as proposed, the donation registry would be a significant improvement over the current state of anonymous charity.

A. Participation

The donation registry should cause a large increase in charitable giving if people actually use it. To begin, nonprofits and the media should entreat public figures, such as politicians, business leaders, sports heroes, and actors, to register their donations. The appeal should emphasize that disclosure demonstrates civic responsibility and encourages generosity in others. Once a significant number of public figures register, we envision a gradual spread to others. Religious and nonprofit organizations should encourage their members to register as an example of their philanthropic leadership. Business organizations should encourage employees to register, much like participation in the United Way. Businesses that achieve a high percentage of registered employees should be recognized for their accomplishment.

Economic theory provides a reason why *most* people might eventually choose to participate in the donation registry. People with a high contribution ratio have an incentive to register, in order to gain recognition for their generosity. People with a low contribution ratio have an incentive not to register, to hide their penury. If an individual does not register, observers would infer that his contribution ratio is below average. To avoid this inference an individual must disclose his contributions. This logic should make registration proceed from the most to the least generous, until almost everyone registers.⁹¹ The technical phrase for this process is a "full information equilibrium."

tax credit for the donations of non-itemizers would make the information credibly accurate and would encourage a higher percentage of non-itemizers to list themselves on the registry.

91. To see why, consider that if people with high contribution ratios register, others will infer that a person who does not register must have a low contribution ratio. This will create pressure for more people to register. Among those who do not register, some will have a higher contribution ratio than others. By registering, they will distinguish themselves as more generous than those who do not register. The process does not stop until almost everyone has registered and each individual's contribution ratio is known.

Defying this logic, some people⁹² may refuse to register out of modesty, believing that anonymous giving is the purest form of altruism.⁹³ While anonymous giving may be most pure, identified giving does more good. A publicized donation sets an example that encourages others to give. Public charity has value beyond the contribution itself. Nonprofits point out this fact and try to change the minds of donors who wish to give anonymously.

Besides modesty, another reason for anonymity is privacy. A person might fear that registration would lead nonprofits to target her for more donations. Note, however, that disclosure over the registry could also shield an individual from solicitations. A registered donor could reply to any solicitor that she has already done her part. Fulfilling one's charitable obligation provides a reason for not giving any more. If policy makers want more privacy protection, legislation could prohibit further solicitations.⁹⁴

B. Other Proposals

Our proposal to increase charity by information is novel. In contrast, past studies focus on tax incentives to increase donations.⁹⁵ The usual proposal to increase charity relies on tax deductions. When a person makes a tax-deductible contribution, the individual pays part of the cost in the form of reduced after-tax income, and the government pays part of the cost in the form of lost taxes. Thus an itemizing taxpayer in the 30% bracket pays 70% of the cost of his charitable contributions, and the government pays the remaining 30%. In these circumstances, economists say that the individual's tax-price of donating one dollar is 70 cents.⁹⁶ To stimulate charity, the government can lower the individual's tax-price,

92. See Amihai Glazer & Kai A. Konrad, *A Signaling Explanation for Charity*, 86 AM. ECON. REV. 1019, 1021 (1996). Glazer and Konrad argue that people try to publicize most of their contributions. The authors support this position with the following facts: "The Pittsburgh Philharmonic received 2240 donations from individuals in 1991. Only 29 (1.29 percent) were anonymous. The fall 1991 *Yale Law Report* (sent to all alumni of Yale Law School) names donors to the Yale Law School Fund. Of the 1950 entries only four are anonymous." While contributions to a symphony or a prestigious law school may be more likely to be publicized for status reasons, these facts suggest that most donors are already comfortable with some level of publicity. *Id.*

93. This sentiment is often attributed to the medieval Jewish philosopher Maimonides. See J. STEVEN OTT, *THE NATURE OF THE NONPROFIT SECTOR* 314-16 (2001).

94. To foreclose solicitations completely, politicians could enact legislation that uses the donation registry as a do-not-call list: charities would be legally prohibited from an unsolicited solicitation of anyone who has registered. Such legislation, however, could hinder some desirable forms of nonprofit fundraising.

95. See *supra* note 45.

96. The general formulation is that the tax price = $1 - t$, where t is the tax rate.

effectively increasing the government subsidy for charity.⁹⁷ This should increase charitable contributions, but at the cost of decreased tax revenues.

Would lowering the tax-price increase or decrease net expenditures on social goods? Economists have tried to determine whether the increase in donations exceeds or falls short of the decrease in tax revenues.⁹⁸ After several econometric estimates, the literature has yet to reach a consensus. Older studies found that the gain in charitable contributions exceeds the loss in tax revenues. Recent studies using panel data, however, suggest that charitable contributions increase by half as much as the loss in tax revenues.⁹⁹ In any case, there is a significant cost to using tax deductions to motivate charity. By contrast, the donation registry does not compromise tax revenues to encourage donations. It simply uses the tax system as a mechanism for publicity.

Ian Ayres and Barry Nalebuff have made a complementary proposal to ours.¹⁰⁰ They argue that income tax instructions should include a table listing average annual contributions for each level of income. Their proposal raises the salience of charity by reminding taxpayers of the prevailing norm, which may trigger their internal commitments to charity.¹⁰¹ They also propose allowing taxpayers to deduct their current donations from the previous year's income up to the tax filing deadline of April 15. We commend these proposals. Our proposal goes beyond Ayres and Nalebuff, however, by allowing aggregate disclosure at the individual level, which addresses the disjunctive nature of the charitable norm.

97. To lower the tax price of charity in the current U.S. tax system, the government could raise the marginal tax rate, or replace the charitable deduction with a partial tax credit. See *supra* note 45 (citing articles that found a negative coefficient for the tax-price).

98. Economists have a useful way of expressing the net effect. The "tax price elasticity" refers to the percentage change in donations caused by a 1% change in the tax-price of donating. For example, a price elasticity of -1.0 means that a 1% decrease in the tax-price would result in a 1% increase in donations. Elasticities exceeding 1 (in absolute value) imply that the additional contributions to nonprofit organizations caused by a reduction in the tax-price would exceed the lost tax revenues (a *treasury efficient* policy). Conversely, elasticities less than 1 (in absolute value) imply that the government would lose more tax revenues than nonprofits would gain through additional donations (a *treasury inefficient* policy).

99. Point estimates for the persistent price elasticity from various studies are -0.47, Barrett, McGuirk & Steinberg, *supra* note 45, at 328, -0.51, Randolph, *supra* note 45, at 724, and -0.79 to -1.26, Auten, Sieg & Clotfelter, *supra* note 45, at 379. Older studies are reported in CLOTFELTER, *supra* note 45, at 57-59.

100. Ayres & Nalebuff, *supra* note 11.

101. The IRS could automatically send a "challenge letter" to each taxpayer. The letter would show the prevailing level of donations (i.e., the mean) by people in a similar income bracket, and would challenge the taxpayer to meet this goal. For itemizing taxpayers, the letter could specifically compare the individual's donations in previous years to the norm. The contents of the letter would remain private. We thank Seana Shiffrin for this suggestion.

IV. VOLUNTEER REGISTRIES—PRO BONO LEGAL SERVICES

The concept of a charitable registry extends from donating money to volunteering time. Legal aid in the United States is largely provided through pro bono work. According to the American Bar Association, “a lawyer should aspire to render at least (50) hours of pro bono public legal services per year.”¹⁰² In fulfilling this aspiration, the lawyer should devote the majority of his pro bono time to the poor. Relative to this standard, voluntary legal services fall lamentably short. In most U.S. jurisdictions, more than 80% of licensed attorneys do not participate in pro bono activities at any level, and the average number of hours volunteered by those who do participate falls significantly below 50 hours per year.¹⁰³

The ABA standard is another example of a disjunctive norm. To know whether or not a lawyer satisfied the ABA standard requires aggregate information about her. A lawyer who did not volunteer on one occasion may have volunteered on another. Without aggregate information, the bar cannot know whom to praise or blame. As with charitable giving, this normative failure reduces the availability of pro bono legal services. Publicity could remedy the problem. A volunteer registry could publicize hours of pro bono work performed by lawyers or by law firms (the “pro bono registry”).¹⁰⁴ Each lawyer or firm would have the option to disclose hours of voluntary service during the past year. The registry would

102. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2009).

103. See DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS 20 (2005). Comprehensive nationwide data on pro bono activity is currently unavailable. The data reported above is from several states that have collected data on pro bono activity within the state. Rhode summarizes various limitations of this data. *Id.* at 18–21.

104. Our primary focus in this Article is on individual disclosure; nevertheless, law firms and other organizations can also take steps to encourage their employees to volunteer or donate. To illustrate, The Pro Bono Institute (PBI) at Georgetown University has created a pro bono challenge for large law firms (more than 50 attorneys). Pro Bono Institute, Law Firm Pro Bono Challenge, <http://www.probonoinst.org/challenge.php> (on file with the University of Michigan Journal of Law Reform). Law firms can become signatories to the challenge. If the firm becomes a signatory it agrees to make an institutional commitment to pro bono and to attempt to devote at least 3% (or 5%) of the firm's total billable hours to pro bono work. *Id.* Each year the signatory firms are asked to submit an annual report to PBI regarding their pro bono work over the past year. The annual reporting requirement is intended to provide an accountability mechanism for signatory firms. The annual reports submitted by participating firms are not publicly disclosed. However, the PBI publishes a list of the law firms that have agreed to participate in the challenge. Pro Bono Institute, List of Signatories, <http://www.probonoinst.org/challenge.sigs.php> (on file with the University of Michigan Journal of Law Reform). The PBI challenge is somewhat different than the donation registry, since it operates at the firm level rather than through individual disclosure. Still, the PBI Challenge clarifies the pro bono standard for large law firms, and uses publicity to reward law firms that pledge to live up to this standard. *Id.*

help to distinguish lawyers and firms that satisfied the ABA standard from those that did not, thus focusing praise and blame.

In fact, several states have already adopted various forms of pro bono reporting.¹⁰⁵ Three states, Florida, Hawaii and Maryland, make pro bono reporting mandatory. Attorneys licensed in Florida, for example, are required to disclose on their annual bar membership dues statement the number of hours of pro bono legal service performed during the past year, and any financial support donated to legal service providers.¹⁰⁶ Failure to report is a disciplinary offense in principle, but not in fact. The sanction for non-reporting is undefined and no disciplinary actions have been taken under this rule. Even so, approximately 90% of Florida's licensed attorneys disclose their hours of service each year.

While reporting is mandatory in Florida, performing pro bono legal service is voluntary. A lawyer may comply with the law by reporting zero hours of service. Even so, more than half (52%) of all attorneys licensed in Florida volunteer for pro bono service each year, which is a higher participation rate than any other state for which data is available.¹⁰⁷ Florida's reporting system has apparently increased the number of volunteer hours of service performed, and also donations of money to legal service providers.

The ABA Standing Committee on Pro Bono and Public Service encourages states to adopt a reporting program.¹⁰⁸ Many states, however, are reluctant to adopt a *mandatory* reporting program like Florida's, in spite of its success. Instead, twelve states have implemented *voluntary* reporting systems for pro bono service: Arizona, Georgia, Illinois, Kentucky, Louisiana, Mississippi, Missouri, Montana, New Mexico, Texas, Utah and Virginia.¹⁰⁹ In most cases, voluntary reporting is requested directly on the state's annual bar membership dues statement or on an accompanying questionnaire. States with voluntary reporting systems have significant

105. See American Bar Association, Standing Committee on Pro Bono & Public Service and the Center for Pro Bono, *State Reporting Policies*, <http://www.abanet.org/legalservices/probono/reporting/pbreporting.cfm> (on file with the University of Michigan Journal of Law Reform) [hereinafter *State Reporting Policies*]. We thank Talbot D'Alemberte, former president of the American Bar Association, for pointing out the involvement of the ABA in pro bono reporting.

106. See *id.*; see also FLA. BAR REG. R. 4-6.1 (1998) (stating that every member of the Florida Bar in good standing should render pro bono services).

107. RHODE, *supra* note 103, at 20.

108. American Bar Association Standing Committee on Pro Bono & Public Service and the Center for Pro Bono, *State Pro Bono Reporting: A Guide for Bar Leaders and Others Considering Strategies for Expanding Pro Bono*, <http://www.abanet.org/legalservices/probono/reportingguide.html> (on file with the University of Michigan Journal of Law Reform) [hereinafter *Reporting Guide*].

109. See *State Reporting Policies*, *supra* note 105.

variation in disclosure rates. In most states 10% to 30% of licensed attorneys report their hours of volunteer service. Many of these programs are too new to judge their success, but limited evidence suggests that voluntary programs increase awareness and provision of pro bono services.¹¹⁰

Whether mandatory or voluntary, the current pro bono reporting systems only disclose information to state bar officials, not to all members of the bar or the general public. Since publicity is so limited, fear of blame or the hope of praise cannot explain the success of these reporting systems. Rather, reporting presumably elicits internal commitments. The annual reminder of their obligation makes internalized commitments feel more compelling.

The most effective obligation, however, must enlist external rewards and punishments, not merely internal motivation. Wider publicity would trigger external enforcement and sharply increase the effectiveness of these reporting systems. To trigger external enforcement, we suggest posting the reports to the internet—a pro bono registry, much like the donation registry. The information should be accessible to all licensed attorneys within the state, or, even better, to the general public. The behavioral experiments discussed above suggest that norms erode over time unless supported by effective sanctions. We predict that a state-wide pro bono registry would lead to significantly greater participation in pro bono services.¹¹¹ Obviously, the pro bono registry concept could extend beyond lawyers to other professions or other types of volunteering.

CONCLUSION

Conservatives and liberals often assume that higher taxes are the only way to increase the supply of social goods. This Article suggests an alternative: private donations can fund additional social goods without increasing taxes or state activity. For donations to play this role, the social norm of charity must increase in effectiveness. The mean donation in the U.S. is around 2% of income, the

110. See *Reporting Guide*, *supra* note 108 (noting that the Bar Foundation of Arizona reports greater awareness of and involvement in pro bono services).

111. Donating labor may also indirectly increase donations of money. Compared to inactive people, individuals who are active in voluntary organizations (such as civic associations or Parent-Teacher Associations) are also more likely to donate money to non-profit organizations. Members of such organizations are 26% more likely to donate than nonmembers. See *GIVING AND VOLUNTEERING STUDY*, *supra* note 3, at 86. This is a correlation, not proof of causation. The correlation cannot indicate whether donating labor causes people to donate money, or vice versa, or a third variable (the disposition to donate) causes both.

median donation is around 1%, and many people donate nothing. Behavioral experiments generally show that subjects contribute more to a public good when other participants observe their contributions. Under current conditions, society rarely observes an individual's charitable contributions. Most Americans donate little because of insufficient information about charitable giving.

Lack of information is particularly problematic for disjunctive obligations like charity. Centralized information is required to know whether or not someone has discharged a disjunctive obligation. In the modern world, however, aggregate information about individual contributions is rarely disclosed. Violations of the charitable obligation are rarely observed and the norm remains unenforced.

To remedy the situation, we propose a voluntary registry for charitable contributions. Specifically, each taxpayer should be able to disclose on the internet his ratio of charitable contributions to income as indicated on his tax return. Experiments in cognitive psychology and behavioral economics suggest that charitable contributions will soar for several reasons. First, disclosing aggregate donations will result in praise of generosity and criticism of penury, as well as other sanctions.¹¹² Second, publicizing charity concretely will prompt discussion about the appropriate amount to give, which will clarify the extent of the charitable obligation.¹¹³ Third, the registry will express the importance that society places on philanthropy. This signal should cause society to jump to a higher level of charitable giving.¹¹⁴

In experiments, contributions approximately double when donations can be observed, as compared to anonymity.¹¹⁵ Even a small increase in the average contribution in the U.S. will significantly increase funding for social goods. Thus, if the mean contribution ratio were increased by half of one percent (from 2.1 to 2.6 percent), \$57 billion in additional revenue would flow to nonprofit organizations.¹¹⁶

112. Behavioral experiments demonstrate that the ability to sanction non-contributors significantly increases contributions. See *supra* text accompanying note 59.

113. See *supra* text accompanying note 58.

114. The literature on the expressive function of law, emphasizes that law can improve the operation of social norms. See generally Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998).

115. See Bohnet & Frey, *supra* note 57 (finding that participants in a dictator game experiment contribute approximately twice as much under two-identification as compared to full anonymity).

116. United States individuals donated \$240 billion in 2002 and the average contribution ratio was 2.1%. GIVING USA 2003, *supra* note 14, at 6. Assuming the same level of aggregate income, a 0.5% increase in the average donation would result in approximately \$57 billion [i.e., $0.5 \times (240/2.1)$] in additional donations.

Besides increasing charitable donations, registration should improve the targeting of contributions. Under the current system, people may give to a particular organization, such as the opera or the United Way, partly because they believe it will publicize their contributions. The organizations that are best at publicity, however, are not necessarily best at meeting social needs.¹¹⁷ By ensuring that all contributions are publicized, the registry helps to correct the distortion, so donors can give more to the charities that use the money more effectively.

117. For the self-interested connection between charity and reputation, see ERIC POSNER, *LAW AND SOCIAL NORMS* 58–62 (2000) (suggesting that charitable contributions are primarily a means to buy prestige); Glazer & Konrad, *supra* note 92, at 1019–20.